

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

<b>LAYTHRON TILLIS, an individual</b>	)	
<b>and ETHEL TILLIS, an individual,</b>	)	
	)	
<b>PLAINTIFFS,</b>	)	
	)	
<b>VS.</b>	)	<b>1:07CV78-WKW</b>
	)	
<b>CECIL E. CAMERON, an individual;</b>	)	
<b>HERTZ CLAIMS MANAGEMENT, a</b>	)	
<b>foreign corporation; THE HERTZ</b>	)	
<b>CORPORATION, a foreign corporation;</b>	)	
<b>HERTZ RENT-A-CAR, a foreign corpora-</b>	)	
<b>tion,</b>	)	
	)	
<b>DEFENDANTS.</b>	)	

**RESPONSE TO  
OPPOSITION TO MOTION TO AMEND**

COME NOW the Plaintiffs and Respond to the Hertz Defendants' Opposition to Motion to Amend Complaint as follows:

1. Federal Rules of Civil Procedure, Rule 15(c) provides that Courts should "freely give leave" to amend when justice so requires. And a Motion for Leave to Amend should be denied "only when a substantial reason exists" to do so. See, e.g., Wyatt v. Bellsouth, Inc., 176 F.R.D. 627 (M.D. Ala. 1998). Although futility is a ground for denying a Motion for Leave to Amend, it should only be granted if the new cause of action does not state a claim upon which relief can be granted. See *id.* In other words, the Court should analyze the "futility" issue just as it would analyze a Motion to Dismiss. The threshold for a Complaint to survive a Motion to Dismiss is "exceedingly low." Ancata v. Prison Health Servs., Inc., 769 F.2d 700 (11<sup>th</sup> Cir. 1985). In order to survive a Motion to Dismiss, however, the Complaint must allege facts that raise the possibility

of recovery to something more than speculation. Bell Atl. Corp v. Twombly, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955 (2007).

2. The Plaintiffs have filed claims which seek compensation under theories that are supported by the law that is applicable to those theories, and against parties which the facts support recovery against. The Plaintiffs' Amended Complaint adds Hertz Rent-A-Car as a Defendant. According to Hertz, the Defendant Cecil Cameron rented a car from "Hertz Rent-A-Car." See affidavit of Mitch Weinstein, representative from Hertz attached hereto as Exhibit "A." Hertz Claims Management claims that it was adjusting the Plaintiffs' claims as an Administrator for "Hertz Rent-A-Car." See letter attached hereto as Exhibit "B." It is based on this evidence that the Plaintiffs added "Hertz Rent-A-Car" as a defendant in this case.

The Plaintiffs have attempted discovery as to Hertz records, but up to this point the Hertz Defendants have objected to the production of any of their records. See Motion to Quash attached hereto as Exhibit "C." The Defendants represented in their Notice of Removal, however, that the Defendant Cecil Cameron lives in Florida. The owner of the car the Defendant Cecil Cameron drove is Hertz, which is located in Orlando, Florida. See accident report attached hereto as Exhibit "D." Presumably, the contract under which the Defendant Cameron drove the car was executed in Florida, as well. The Plaintiffs allege, and Hertz's own evidence suggests, that it is this contract that enabled Mr. Cameron to drive the car which collided with Mr. Laythron Tillis's car in the first place.

In Alabama courts, the state where the contract was executed provides the law that governs the interpretation of the contract and the relationship of the parties to that contract. See Ferris v. Jennings, 851 F. Supp. 418 (M.D.Ala. 1993). In the present case, therefore, Florida law governs these issues. Under Florida's "dangerous instrumentality doctrine," an owner who

authorizes someone else to operate the owner's vehicle, whether by express or implied consent, has a nondelegable duty to ensure that the vehicle is operated safely. See, e.g., Villaneuva v. Youngblood, 927 So. 2d 955 (Fla. 2006). It is not based on principles of respondeat superior or agency; but is, rather, based on the fact that "the owner of an instrumentality which has the capability of causing death or destruction should in justice answer for the misuse of this instrumentality by anyone operating it with his knowledge and consent." Saullo v. Douglas, 957 So. 2d 80 (Fla. 2007).<sup>1</sup>

The Plaintiffs have amended their Complaint to state, among other things, that as owners of the subject vehicle which Mr. Cameron rented, these defendants are responsible for Mr. Cameron's behavior. The Plaintiffs have, therefore, alleged claims that entitle them to relief; and the possibility of relief is more than speculative. In light of the evidence that exists at this point, the fact that the Defendants can later raise in a dispositive motion the same issues they now raise, and in light of the policy favoring amendments to pleadings in the first place, the Plaintiffs request this Court to allow their amended pleading.

/s/Thomas B. Albritton  
Thomas B. Albritton (ALB009)  
Attorney for Plaintiffs

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<sup>1</sup>Defendants make reference to 49 U.S.C.A. §30106 (2005), also known as the "Graves Amendment," and claim that it "effectively preempts" any state's vicarious liability law. The Graves Amendment, however, does not apply to actions filed before its effective date. The effective date of the Graves Amendment was August 10, 2005. The present action was filed on April 13, 2004, over a year prior to the effective date of that Amendment. Moreover, the Graves Amendment by its own terms does not preempt claims based on state law if the owner of the vehicle (in this case, Hertz) was negligent. As discovery is just beginning in the present case, disallowing the Amended Complaint at this point would be premature and would involve the resolution of issues of fact more appropriately analyzed at summary judgment.

OF COUNSEL:  
ALBRITTONS, CLIFTON, ALVERSON  
MOODY & BOWDEN, P.C.  
P.O. Box 880  
Andalusia, AL 36420  
(334)-222-3177  
(334)-222-2696

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing upon all counsel of record in this cause by electronic service if registered, and if not, then by regular U.S. Mail, postage prepaid, to the following on this, the 16th day of January, 2008:

Mr. David W.Henderson  
HILL, HILL, CARTER, FRANCO,  
COLE & BLACK, P.C.  
Post Office Box 116  
Montgomery, AL 36101-0116

Mr. Rainer Cotter  
MARSH, COTTER, & STEWART  
P.O. Box 310910  
Enterprise, AL 36331

/s/Thomas B. Albritton  
Of Counsel

IN THE CIRCUIT COURT OF COFFEE COUNTY, ALABAMA  
ELBA DIVISION

LAYTHRON TILLIS, an individual  
and ETHEL TILLIS, an individual,

Plaintiffs,

vs.

CECIL E. CAMERON,

Defendant.

CV-2004-49

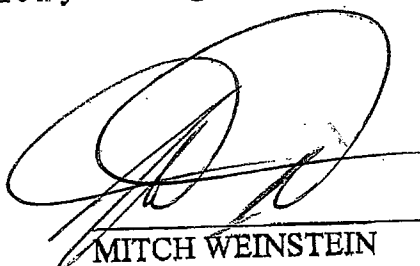
STATE OF FLORIDA  
COUNTY OF Broward

AFFIDAVIT OF MITCH WEINSTEIN

1. My name is Mitch Weinstein and I am over the age of 19 years and competent to testify. I am the bodily injury examiner (adjuster) for Hertz Claim Management Corporation. I am familiar with the allegations raised in the *Laythron Tillis* Complaint, having reviewed that Complaint myself. I am also aware of the service of process issues arising in this case. I give this affidavit based on personal knowledge and my investigation of this particular claim.
2. Upon my initial investigation into this case, I found the alleged accident occurred on or about April 14, 2002 and Cecil E. Cameron was driving a car he had rented from Hertz Rent-A-Car. I attempted to contact Mr. Cameron by telephone and U.S. Mail to investigate this claim and lawsuit.
3. Despite my investigation, at no time have I had any contact with the defendant, Cecil E. Cameron. Mr. Cameron's last known address is 33 A Magnolia Avenue, Ft.

Walton Beach, Florida 32548. To my knowledge, Mr. Cameron does not know about  
this claim or lawsuit.

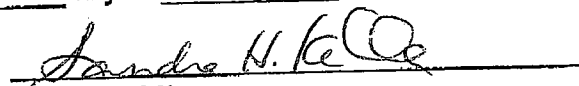
Further affiant saith not.

  
MITCH WEINSTEIN

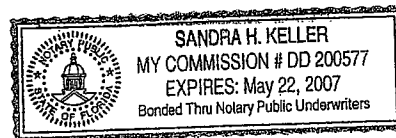
STATE OF Florida  
COUNTY OF Broward

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State,  
personally appeared Mitch Weinstein, whose name is signed to the foregoing and who is known to  
me, acknowledged before me on this date, that, the foregoing is true and correct to the best of his  
knowledge, information and belief.

SWORN and subscribed before me, this the 22 day of October, 2004.

  
Notary Public  
My Commission Expires: \_\_\_\_\_

(seal)





07/03/2003

Hertz Claim Management Corporation  
3400 Lakeside Drive, Suite 520, Miramar, FL 33027  
Telephone: (800) 543-0499  
Fax: (866) 222-7090

THOMAS ALBRITTON  
109 OPP AVENUE  
PO DRAWER 880  
ANDALUSIA AL 36420-0880

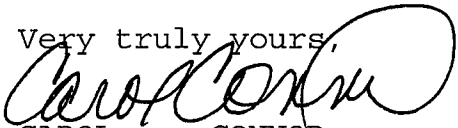
RE: OUR CASE NUMBER: 01-2002-06099-N  
DATE OF ACCIDENT: 04/14/2002  
YOUR CLIENT: LATHAN TILLIS  
ADMINISTRATORS FOR: HERTZ RENT A CAR

Dear mr. albritton:

To date, we have received some copies of your client's supporting documentation. Please forward a complete packet of specials and a demand to settle this case. This information is necessary to enable Hertz Claim Management to fully evaluate this claim.

Upon receipt of the above documentation we will be in a position to discuss the merits of this claim with you.

Very truly yours,



CAROL CONNOR  
Claims Department  
(DOCR2-A)

IN THE CIRCUIT COURT OF COFFEE COUNTY, ALABAMA  
ELBA DIVISION

LAYTHRON TILLIS and ETHEL TILLIS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. CV-2004-049
	)	
CECIL E. CAMERON,	)	
	)	
Defendant.	)	

**MOTION TO QUASH THIRD PARTY SUBPOENA**  
**OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER**

COMES NOW Hertz Claim Management, and makes this appearance solely to submit this Motion to Quash or, in the alternative, Motion for Protective Order, and without submitting to the jurisdiction of this Court. As grounds for this Motion, said non-party states as follows:

1. Upon information and belief, on or about September 11, 2006, Plaintiffs issued a subpoena directing Hertz Claim Management, a non-party, to produce its "complete claims file for Laythron Tillis' claim... ." See Exhibit "A."


2. Said subpoena is over-broad and seeks information which is protected from disclosure in accordance with relevant Alabama law. See Ex parte Nationwide Mut. Fire Ins. Co., 898 So. 2d 720 (Ala. 2004); Ex parte State Farm Mut. Automobile Ins. Co., 386 So.2d 1133 (Ala. 1980). Said claims file contains privileged matter and constitutes protected work product and matter prepared in anticipation of litigation.

3. Attached hereto is an affidavit of Jim McAteer of Hertz Claims Management. See Exhibit "B" attached hereto. Mr. McAteer states that the materials in the subject claim file contains privileged matter and contains matter prepared in anticipation of litigation and is protected from disclosure pursuant to the work product doctrine. As noted by Mr. McAteer, the subject claims file contains letters from defense counsel; notes memorializing conversations with defense counsel and Plaintiff's counsel and claims' personnel; litigation strategy; legal opinions, conclusions, and assessments and other similar matter.

4. Also, upon information and belief, it is the understanding of the undersigned that Plaintiff's counsel is seeking testimony and production from Hertz Claims Management concerning the whereabouts of the Defendant. As established by the affidavits of Mr. McAteer and Mitch Weinstein (See Exhibits "B" and "C"), Hertz Claims Management has no knowledge concerning the whereabouts of the Defendant.



Wherefore, Hertz Claims Management requests the Court to quash the subject subpoena or in the alternative, enter an appropriate protective order limiting the scope of the same.

  
\_\_\_\_\_  
R. RAINER COTTER, III (COT010)  
Attorney for Hertz Claims Management

OF COUNSEL:

MARSH, COTTER & STEWART, LLP.  
P.O. Box 310910  
Enterprise, Alabama 36331  
334-347-2626

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing on the following attorneys of record by placing a copy of the same in the U.S. Mail, postage prepaid and properly addressed this 26<sup>th</sup> day of September, 2006:

Thomas B. Albritton, Esq.  
P.O. Box 880  
Andalusia, Alabama 36420

David W. Henderson, Esq.  
P.O. Box 116  
Montgomery, Alabama 36101

  
\_\_\_\_\_  
OF COUNSEL

Shaded Areas To Be Used By Data Processing Only

Sheet 1 of 3 Sheet(s)

Microfilm No

Local Case No: 202060725

LOCATION AND TIME	Date 04 14 2002	Time 15:35	AM PM MT	Day of Week M T W T H F S S F S S	County 23	City FLORALA	Rural	Highway Classification: 1- Interstate S- State 2- Federal C- County O- Other	M- Municipal Local Zone						
	On Street Road or Highway U.S. HWY 331		At Intersection of or Between (Node 1)		And (Node 2)		61- Overturned 62- First Explosion 63- Immersion 64- Gas Inhalation		NON COLLISION EVENT 65- Spill 66- Road/Bridge Collapsed 67- Jackknifed	68- Parts/Cargo Fell From Moving Vehicle 69- Trailer Hitch Came Loose 70- Other					
	Street or Road Code		Node Code		Node Code		Feet From 1 or 2 Miles (Circle One)		COLLISION EVENT 71- Malfunction 72- Gas Line 73- Barbed Wire 74- Bridge Rail 75- Cabinet Hardware 76- Casing 77- Retaining Wall 78- Median Barrier 79- Sidewalk 80- Foreign Material in Road 81- Pothole 82- None 83- Other						
	Intersection Related 1 Node 1 2 Node 2 N Not Int Related		Mile Post		Control Access Hwy Loc		1 Main Rd 3 Interchange 5 Exit Ramp 2 Frontage Rd 4 Entrance Ramp		Prime Contr Circum 05		Prime Contr Unit No 1				
UNIT NO 1 LEFT SCENE COM VEH	Driver Full Name CECIL E. CAMERON		Street Address 33A MAGNOLIA AVE.		City and State FT. WALTON BCH, FL.		Zip 32548		Telephone No 850 362-1176						
	DOB 04 15 1954		Race W	Sex M	DL State FL	Driver License No. C565-105-54-135-0		DL Class E	DL Status C	List Restrictions Not Complied With	CDL Status	List Endorsements Not Complied With	Residence Less Than 25 Miles Yes No		
	Place of Employment UNKNOWN		Liability Insurance Co. HERTZ RENTAL CORP.		Social Security No 3 2 1 1 - 5 0 1 - 3 2 0 8										
	Driver Condition: 1- No Defect 3- Fatigued 8- Other 2- Apparently Asleep 4- Ill 9- Unknown		Subsidiary		Officer's Opinion:		Alcohol: Yes No Unk Drugs: Yes No Unk		Type Test Given: 1- Blood Test 3- Urine Test 2- Breath Test 4- Unable to Administer 5- Refused Test		Test Results N/A				
UNIT 1 VEHICLE	Maneuver 01		Travel Road Name U.S. HWY 331		Road Code S009		Travel Direction N E S W A - Not on Rd U - Unk		Other Contr Circumstance 05		Prime Harm Event 20		Event Loc 1		
	Veh Year 2002		Make FORD	Model 150	Body PU	V.I.N. 1FTRX18L52NA38823		License Tag Number EC909P		State FL		Year 2002			
	Owner's Name HERTZ RENTAL CORP.		Street or R.F.D. 520 N SEMORAN BLVD. SUITE 140		City ORLANDO		State FL		Zip 32807						
	Type 1- Auto 11- Moped 2- Sta. Wagon 12- M. Scooter 3- Pick Up 13- Pedal Cycle 4- Van 14- Farm Mach. 5- Truck Tractor 15- Train 6- Other Truck 16- Road Equip. 7- Comm Bus 17- Ridden Animal 8- School Bus 18- M. Home (R.V.) 9- Other Bus 19- ATV 10- Motorcycle 20- Other		Usage 1- Personal 10- Police 2- Driver Trng. 11- Other 3- Construction Business 4- Ambulance/ Paramedical 5- Military 12- Bus/Pass. Transport 6- Taxi 13- Fire Fighting 7- Transport Prop 14- Other 8- Agriculture 15- Other 9- Wrecker/Tow		Hazardous Cargo 1- None 2- Explosive 3- Gas 4- Flamm/Combust Liq. 5- Flammable Solids 6- Oxidizer/Peroxide 7- Poison 8- Radioactive Material 9- Corrosive Material 10- Other		Attachment 1- None 2- Mobile Home 3- Semi Trailer 4- Utility Trailer 5- Wheel Trailer 6- Boat Trailer 7- Camper Trailer 8- Towed Vehicle 9- Tanker 10- Pole Trailer 11- Double Trailer 12- Other		Contributing Defect 1- Brakes 2- Steering 3- Power Plant 4- Suspension 5- Tires 6- Exhaust 7- Lights 8- Turn Signal 9- Windows/ Windshield 10- Restraint Sys. 11- Wheels 12- Truck Coupling 13- Cargo 14- Fuel System 15- Other 16- Unknown		Circle areas Damaged On Diagram 1- Under Carriage 2- N/A 3- N/A 4- N/A 5- N/A 6- N/A 7- N/A 8- N/A 9- N/A 10- N/A 11- N/A 12- N/A 13- N/A 14- N/A 15- N/A 16- N/A 17- N/A 18- N/A 19- N/A 20- N/A 21- Attachment				
UNIT 2 LEFT SCENE COM VEH	Driver Full Name LAYTHRON TILLIS		Street Address 602 COUNTY RD. 377		City and State ELBA, AL.		Zip 36323		Telephone No 334 493-4399						
	DOB 12 31 1959		Race B	Sex M	DL State AL	Driver License No. 3897631		DL Class DM	DL Status C	List Restrictions Not Complied With	CDL Status N	List Endorsements Not Complied With	Residence Less Than 25 Miles Yes No		
	Place of Employment UNKNOWN		Liability Insurance Co. ALFA # A1569933		Social Security No 4 2 3 1 - 1 8 8 1 - 3 4 6 2										
	Driver Condition: 1- No Defect 3- Fatigued 8- Other 2- Apparently Asleep 4- Ill 9- Unknown		Subsidiary		Officer's Opinion:		Alcohol: Yes No Unk Drugs: Yes No Unk		Type Test Given: 1- Blood Test 3- Urine Test 2- Breath Test 4- Unable to Administer 5- Refused Test		Test Results N/A				
VEHICLE OR PEDESTRIAN	Maneuver 19		Travel Road Name U.S. HWY 331		Road Code S009		Travel Direction N E S W A - Not on Rd U - Unk		Other Contr Circumstance 19		Prime Harm Event 20		Event Loc 1		
	Veh Year 1995		Make NISS	Model ALT	Body 4D	V.I.N. 1N4BU31D0SC208709		License Tag Number 19AM853		State AL		Year 2002			
	Owner's Name LAYTHRON TILLIS		Street or R.F.D. 602 COUNTY RD 377		City ELBA		State AL		Zip 36323						
	Type 1- Auto 11- Moped 2- Sta. Wagon 12- M. Scooter 3- Pick Up 13- Pedal Cycle 4- Van 14- Farm Mach. 5- Truck Tractor 15- Train 6- Other Truck 16- Road Equip. 7- Comm Bus 17- Ridden Animal 8- School Bus 18- M. Home (R.V.) 9- Other Bus 19- ATV 10- Motorcycle 20- Other		Usage 1- Personal 10- Police 2- Driver Trng. 11- Other 3- Construction Business 4- Ambulance/ Paramedical 5- Military 12- Bus/Pass. Transport 6- Taxi 13- Fire Fighting 7- Transport Prop 14- Other 8- Agriculture 15- Other 9- Wrecker/Tow		Hazardous Cargo 1- None 2- Explosive 3- Gas 4- Flamm/Combust Liq. 5- Flammable Solids 6- Oxidizer/Peroxide 7- Poison 8- Radioactive Material 9- Corrosive Material 10- Other		Attachment 1- None 2- Mobile Home 3- Semi Trailer 4- Utility Trailer 5- Wheel Trailer 6- Boat Trailer 7- Camper Trailer 8- Towed Vehicle 9- Tanker 10- Pole Trailer 11- Double Trailer 12- Other		Contributing Defect 1- Brakes 2- Steering 3- Power Plant 4- Suspension 5- Tires 6- Exhaust 7- Lights 8- Turn Signal 9- Windows/ Windshield 10- Restraint Sys. 11- Wheels 12- Truck Coupling 13- Cargo 14- Fuel System 15- Other 16- Unknown		Circle areas Damaged On Diagram 1- Under Carriage 2- N/A 3- N/A 4- N/A 5- N/A 6- N/A 7- N/A 8- N/A 9- N/A 10- N/A 11- N/A 12- N/A 13- N/A 14- N/A 15- N/A 16- N/A 17- N/A 18- N/A 19- N/A 20- N/A 21- Attachment				
CODES	Contributing Circumstances		Driver Maneuver		Pedestrian Action		Event Location								
	01- Improper Passing 02- Improper Lane Change/Usage 03- Improper Turn/Use 04- Failure to Yield 05- Misjudging Distance 06- Over Speed Limit 07- Avoid Object/Person/Veh 08- Unseen Object/Person/Veh 09- Improper Backing 10- Improper Traffic Control 11- Improper Signal 12- Failure to Heed Sign/Signal		13- Improper Driving-Environ 14- Road Defect 15- Vehicle Obstruction 16- Defective Equipment 17- DUI 18- Under Min Speed 19- Improper Load/Size 20- Improper Attachment 21- Fail to Yield Right-of-Way 22- Driver Condition 23- Wrong Side of Road 24- Veh Pushed/Towed by Veh		25- Veh Pushed by Person 26- Veh Left Road 27- Driver Not in Control 28- Load Shift 29- Parts/Cargo From Veh 30- Ped Violation 31- Veh Wgt/Hgt/Lnths 32- Ped Under Vehicle 33- Improper Parking 34- None 35- Other 36- Unknown		01- Go Straight Ahead 02- Pass on Left 03- Pass on Right 04- Pass on Right Lane 05- Go Straight-Left Turn Lane 06- Go Straight-Right Turn Lane 07- Change Lanes-Left 08- Change Lanes-Right 09- Merge-Left 10- Merge-Right 11- Wrong Side of Road 12- Wrong Way-1 Way		13- Right Turn 14- Left Turn 15- U-Turn 16- Start From Park 17- Start in Traffic 18- Stopping/Stopping 19- Stopped in Traffic 20- Avoid Object in Road 21- Exiting Private Road/Property 22- PedCyc Ride with Traffic in Road 23- PedCyc Ride with Traffic in Road 24- PedCyc Ride Against Traffic in Road		01- Cross/Enter-Intersection 02- Cross/Enter-Other 03- Walk in Road-With Traffic 04- Walk in Road-Against Traffic 05- Stand in Roadway 06- Get on/off Vehicle 07- Push/Pull on Vehicle 08- In Road-Other Work 09- In Road-Playing 10- In Road Other 11- Not in Road 12- Other 13- Unknown		1- On Roadway 2- Off Roadway 3- Median 4- Driveway 5- Private Road/Property 6- In Intersection		